



## **The New Directive on Privacy and Electronic Communications (2002/58/EC) - Unsolicited Commercial Communications and other issues**

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Philippe GERARD, DG Information Society



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# I - Background

# **A - The New Framework for Electronic Communications**

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- ◆ **Directive is part of a new EU regulatory framework for electronic communications**
- ◆ **5 other legal acts adopted on 7 March 2002, applicable as from July 2003**
- ◆ **Overall objective: adapt existing law to current and expected changes in markets, services and technologies**

# **B - General Data Protection Directive 95/46/EC**

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- ◆ **Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data**
- ◆ **Harmonises Member States' rules on data protection in order to ensure the free flow of personal data in the EU (e.g. purpose limitation, fair processing etc.)**
  - ◆ **OJ L 281, 23.11.1995.**

# C - The 1997 Telecoms Data Protection Directive

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**Directive 97/66/EC translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector e.g.:**

- ◆ **network security**
- ◆ **confidentiality**
- ◆ **traffic data**
- ◆ **calling line identification**
- ◆ **public directories**
- ◆ **unsolicited commercial calls and faxes**

# D - Why change?

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- ◆ **To reflect developments in the markets and technologies for electronic communications services, such as the Internet ...**
- ◆ **...so as to provide an equal level of protection of personal data and privacy, regardless of the technology used.**

# E - What does Directive 2002/58/EC change?

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## Main changes :

- Technology neutral coverage
- Updated definitions
- Opt-in for unsolicited e-mails
- Clarification on use of cookies
- Admissible use of traffic data
- New rules on location data
- Opt-in for subscriber directories
- Clarification on data retention



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## **II - Unsolicited Commercial Communications (spam) and Other Issues**

# **A - Scope and Definitions (Arts 1-2)**



- ◆ **Relationship with general Directive 95/46/EC: applicable unless otherwise provided**
- ◆ **Services concerned: on public communications network in the EU**
- ◆ **Widening of coverage to all electronic communications networks and services**
- ◆ **New definitions for communication, traffic data, location data and e-mail (see below)**

# **B - Unsolicited Commercial Communications / Spam (I) - Why EU legislation?**

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- ◆ **Single market approach needed**
- ◆ **Unsolicited faxes and automated calls already under an opt-in**
- ◆ **Spam is a problem for the development of e-commerce and the information society (e.g. confidence)**
- ◆ **Spam creates costs and nuisance for professionals and consumers**
- ◆ **Filtering systems currently used by ISPs seem open to legal challenge**

# **B - Unsolicited Commercial Communications / Spam (II) - Why an opt-in?**

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- ◆ **Permission-based marketing seems to be very efficient (spam study 2001)**
- ◆ **Several Member States had an opt-in**
- ◆ **User empowerment**
- ◆ **Privacy is a right, not an option**
- ◆ **Opt-out lists do not work well in practice (unlimited number, consulting them costs money, abuse)**
- ◆ **How distinguish 'good' from 'bad' spam**
- ◆ **Easier to implement e.g. at int'l level**
- ◆ **Many possibilities (e.g. Web) to obtain consent from e-mail users.**
- ◆ **The harvesting of e-mail addresses is contrary to data protection principles**

# **B - UCC/Spam (III) - Basic Principles (Art 13)**

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- ◆ **Opt-in for unsolicited e-mail for direct marketing**
- ◆ **Broad technology neutral definition (covering also SMS, MMS etc.)**
- ◆ **Opt-out for use of contact details of existing customers**
  - ◆ in the context of a sale
  - ◆ similar products or services
- ◆ **Legal persons' legitimate interests to be 'sufficiently protected' (B2B marketing)**

# B - UCC/Spam (IV) - Definition of Electronic Mail

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- ◆ *“Any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient.” (Art 2)*
- ◆ **This means any form of electronic communication for which the simultaneous participation of the sender and the recipient is not required.**

# **B - UCC/Spam (V) - Concept of Direct Marketing**

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- ◆ **Covers any form of sales promotion**
- ◆ **Includes direct marketing by charities and political organisations (e.g. fund raising)**
- ◆ **Harmonised approach within EU to be ensured notably through the Article 29 Working Party composed of national data protection authorities**

# B - UCC/Spam (VI) - Existing customer relationships

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- ◆ **Opt-out allowed for use of contact details obtained from customers in the context of a sale**
  
- ◆ **But:**
  - ◆ **May be used by the same company only**
  - ◆ **Only for marketing of similar products or services**
  - ◆ **Explicit opt-out must be offered at time of collection and with each message**

# **B - UCC/Spam (VII) - Additional Safeguards**

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- ◆ **Disguise of identity of sender is prohibited**
- ◆ **All marketing messages must include a valid return address and allow opt-out also after earlier opt-in**
- ◆ **Review in 2006 with particular emphasis on UCC/Spam**

# **B - UCC/Spam (VIII) - Application and Enforcement**

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- ◆ **In short: rules on spam apply to all messages sent over EU networks, regardless of where they originate**
- ◆ **Adequate complaint and penalty mechanisms must be established e.g. individual right or action, claims for damage, sanctions.**
- ◆ **For messages from outside the EU especially by the ‘bad guys’, enforcement will not be easy**
- ◆ **Cooperation with third countries needed**
- ◆ **Practical follow-up underway**

# C - Spyware and Cookies (Art 5(3))

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- ◆ **New provision**
- ◆ **Requirement to inform users of any invisible tracking devices placed on their terminals (e.g. cookies, spyware)**
- ◆ **Inform about purposes of such devices (purposes must be legitimate i.e. in conformity with general data protection directive)**
- ◆ **Obligation to offer the user a possibility to refuse**

# D - Processing of Traffic Data (Art 6)

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- ◆ **Use for service provision and billing**
- ◆ **Obligation to erase**
- ◆ **Reminder: Extended coverage to all electronic communications**
- ◆ **Permission based use for value added services if consent**
- ◆ **Information obligation**

# F - Processing of Location Data (Art 9)

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- ◆ **New provision**
- ◆ **Permission based use only**
- ◆ **Reminder: Extended coverage to all electronic communications**
- ◆ **Full information required**
- ◆ **Temporary blockage facility for users**
- ◆ **Override available for emergency services**

# G - Public Subscriber Directories (Art 12)

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- ◆ **Change of default : Opt-in for subscribers**
- ◆ **Not opting-in or opting-out : free of charge**
- ◆ **Full information required e.g. on reverse search**
- ◆ **National choice on separate opt-in for reverse search**
- ◆ **New rules apply to new subscribers only**

# Timetable



- ◆ **Adoption and publication in July 2002 (Official Journal No L 201, 31 July 2002)**
- ◆ **Transposition in national law by 31 October 2003 at the latest**
- ◆ **Review in 2006, with particular emphasis on UCC/Spam**

# further information:

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**Philippe.GERARD@cec.eu.int**

**tel: +32.2.296.86.44**

**fax: +32.2.295.99.97**

**mail: European Commission, B - 1049  
Brussels**

**Directive 2002/58/EC is available at:**

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